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SERVICE DATE - OCTOBER 28, 1999

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41290

THE SHERWIN-WILLIAMS COMPANY
v.
GROSS COMMON CARRIER, INC.

Decided: October 25, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This proceeding arises out of a court action in the United States District Court for the Western District of Wisconsin, in Gross Common Carrier, Inc. v. The Sherwin-Williams Company, No. 94-C-2168-S. The court proceeding was instituted by Gross Common Carrier, Inc. (Gross or defendant), a former motor common and contract carrier, to collect undercharges from The Sherwin-Williams Company (Sherwin-Williams or complainant). Gross seeks undercharges of $82,854.61 allegedly due, in addition to amounts previously paid, for services rendered in transporting 411 shipments of paint and related articles from the Gross terminal at Hopkins, IL, to points in Indiana, Iowa, Michigan, Minnesota, North Dakota, South Dakota, Wisconsin, and Ohio between December 1988 and August 1991. By order entered June 13, 1994, the court dismissed the proceeding without prejudice and referred the matter to the ICC for resolution.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

Pursuant to the court order, Sherwin-Williams, by complaint filed July 19, 1994, requested the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served August 25, 1994, the ICC established a procedural order for the submission of evidence on non-rate reasonableness issues. On October 24, 1994, complainant filed its opening statement. Defendant filed its reply statement on December 13, 1994, and Sherwin-Williams submitted its rebuttal on December 30, 1994.

Complainant asserts that no additional charges are due to Gross in that the originally assessed rates billed by Gross and paid by complainant conformed with Gross Tariff ICC GRCC 200-E and were the applicable rates for the subject shipments.[2] Sherwin-Williams states that Gross now seeks to void application of the tariff and substitute joint-line rates that are two or three times the rates originally assessed because the shipments were interlined rather than handled in single-line service. Complainant maintains that defendant possessed the operating authority to perform direct single-line service and held itself out to perform that service.[3] Sherwin-Williams contends that Gross chose to interline the subject shipments for its own convenience and without complainant's knowledge or approval.

Complainant supports its contentions with an affidavit from Ann M. Cleland, Office Manager for Edwards & Associates, a tariff research company. Ms. Cleland reviewed the defendant's filed tariffs and corrected freight bill claims. She states that Tariff ICC GRCC 200-E (Item 3329)[4] contained the rates charged in the original freight bills and that those rates were commodity rates specifically applicable to Sherwin-Williams shipments subject to this proceeding. (See Appendix B to Ms. Cleland's statement). Ms Cleland notes that a 10% discount was applied when Sherwin-Williams delivered its traffic to defendant's Hodgkins terminal.[5] She states that, although Tariff 200-E recognizes the possibility of interlining, there is no provision in that tariff that precludes the application of the specific commodity rates when interlining occurs. Ms. Cleland notes that Gross' theory of collection in this case would give it the sole and exclusive right to vary the rate for a particular shipment while it was in transit. Under this theory, she states, the rates assessed Sherwin-Williams would vary depending on whether Gross chose to handle shipments in direct service or, for its own convenience and at its own discretion, use another carrier for a portion of the movement. Ms. Cleland, noting that the charges assessed in the "corrected" freight bills are two or

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[2] Complainant comments in its opening statement that, while it is not presently pursuing relief under section 2(e) of the NRA, such relief is available to it.

[3] The parties have stipulated that Gross is the only carrier identified in the "route" portion of the subject shipment bills of lading. (Appendix A to complainant's opening statement).

[4] Complainant asserts in its rebuttal that the rates in Item 3329 were specifically negotiated by the parties for purposes of application to complainant's traffic.

[5] Complainant indicated in its opening statement that the 10% discount was applied in substantially all of the originally issued freight bills.

three times the charges originally billed, is of the opinion that Sherwin-Williams would not have tendered any of its traffic to a carrier that attempted to assess the rates that Gross here seeks to collect. She states that, during the period the subject shipments were transported, complainant would have had no difficulty obtaining rates from any number of carriers comparable to those originally assessed.

Attached as Exhibit A to Ms. Cleland's statement is a representative corrected freight bill issued by defendant that reflects the originally issued freight bill data as well as the "corrected" balance due amount.[6] An examination of the corrected freight bill indicates that the initially assessed charge was substantially less than one-half the amount here being sought by defendant.

Gross contends that the rates initially charged Sherwin-Williams were erroneous because they were based on a tariff provision applicable to single-line movements or interline movements involving connecting carriers that were participants in the tariff. It maintains that all the shipments at issue were interlined with connecting carriers that were not participants in the discount tariff.[7] Accordingly, Gross re-rated the charges based on applicable joint line tariffs.[8] It argues that ICC tariff regulations (49 CFR 1312.13(c)) bar application of the rates originally assessed because the interlining connecting carriers were not participants in the tariff. Gross claims that the decision in Security Service, Inc. v. K-Mart Corporation, 511 U.S. 431 (1994) (Security Services) dictates this result.[9]

Gross supports its position with affidavits from Oscar P. Peck, founder of Truck Rates Co., Inc.,[10] and Roger Placzek, defendant's Vice President-Sales and Marketing. Mr. Peck was engaged by Mark/AGL, Inc., the court-appointed auditor in defendant's bankruptcy proceeding, to audit defendant's freight records. Mr. Peck states that he specifically reviewed the freight bills for the subject shipments to determine whether the shipments moved in joint-line service. He asserts that all

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[6] The same sample freight bill was attached as Exhibit C to complainant's opening statement.

[7] Gross maintains that interlining was in accord with the terms of the underlying bills of lading, that the shipments were interlined in order to effect delivery within the time frame specified by Sherwin-Williams, and that complainant was made aware of this practice from indications contained in the freight bills issued by Gross.

[8] In re-rating the subject shipments, defendant relied on bureau class rate tariffs published in the Central States and Middle West rate bureau tariffs in which both Gross and the involved connecting carriers were participants.

[9] In Security Services the Supreme Court determined that carriers that did not participate in a referenced mileage guide could not rely on mileage rate computations dependent upon such guide.

[10] Truck Rates is a Texas corporation specializing in the audit of motor carrier freight bills and the collection of undercharge claims.

of the subject shipments involve interline movements between Gross and connecting carriers that were not participating carriers in Tariff 200-E[11] and that the rates specified in that tariff are not applicable.

Mr. Placzek asserts that decisions to interline shipments originated by Gross were based on whether interlining was necessary to effect delivery of the shipment with reasonable dispatch. He states that regular users of defendant's service were familiar with the fact that some of their shipments would involve the use of interline carriers and points out that in most instances the use of an interlining carrier was reflected in the routing section and other portions of the freight bills issued by Gross.[12]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.[13]

At the outset, we recognize that the issues raised for our consideration focus primarily on tariff applicability and rate reasonableness issues, and that complainant in its opening statement indicated an intention at the time not to pursue relief under section 2(e). Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is entirely appropriate. The

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[11] Mr. Peck identifies the participating carriers in Tariff 200-E other than Gross as Belleville Truck Line, Fort Transportation and Service Company, West Bend Transit and Service Company, and Seymour Transfer Line, Inc., and indicates that the latter four carriers were not involved in the subject movements. Mr. Peck did not identify the actual interlining carriers.

[12] Sherwin-Williams, in its rebuttal, indicates that it had no reason to question defendant's routing practice because "the rates being assessed were being taken from the 200-E tariff."

[13] The complainant has argued that: (1) the carrier's decision to interline with connecting carriers that were not participants in the tariff was made unilaterally and for its own convenience; and (2) it would be an unreasonable practice for the carrier to assess a higher rate as a result of this decision. While we are deciding this case under section 2(e), we note that under ICC precedent a carrier generally would not be allowed to avoid a discount tariff by interlining outside that tariff without the consent of the shipper and for its own convenience. The discount tariff would be deemed to apply to the involved shipment. Motor carriers are generally required to charge the lowest rate that they could lawfully charge for a given service. See, e.g., Murray Co. of Texas v. Morrow, Inc., 54 M.C.C. 442 (1952); Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc., 302 I.C.C. 173 (1957); Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 460 (1962); and Anacomp, Inc; Et Al.--Petition for a Declaratory Order--Certain Rates and Practices of Churchill Truck Lines, Inc. (Trans-Allied Audit Company, Inc.), No. 41573 (ICC served Aug. 7, 1995). There is an exception where the carrier was legally or physically unable to operate under the lowest-rate tariff. There may also be an exception when the shipper assented to a higher rate for its own purposes. Neither of these exceptions would appear to apply here.

Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other dispositive grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution--one that was adopted by Congress as a surrogate for the more complex tariff applicability and rate reasonableness provisions--we rely on it. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); and Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995).

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[14]

We note that Section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection efforts would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than the rate legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." American Freight Systems, Inc. v. ICC 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, if we accept Gross' argument that the tariff at issue was not applicable to the involved shipments because the shipments were interlined with carriers that were not participants in the tariff, then Gross offered a rate to Sherwin-Williams that was not legally on file for those shipments, even though it may have been a negotiated rate.

[14] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation services provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments at issue in this proceeding, including the 72 shipments transported after September 30, 1990.

Federal Highway Administration records now confirm that Gross no longer transports property.[15] Accordingly, we may proceed to determine whether Gross' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a copy of a balance due bill representative of the 411 balance due bills issued by defendant that indicates an originally assessed charge substantially below the amount defendant is now attempting to assess. The record also includes Item 3329 of Tariff ICC GRCC 200-E that, according to the unrefuted testimony of Ms. Cleland, sets forth the commodity rates specifically applicable to the subject Sherwin-Williams shipments that were assessed in the original freight bills. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.-- Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by Gross and paid by Sherwin-Williams. The consistent application in the original freight bills of assessed charges that conform with the rates set forth in Item 3329 of Tariff ICC GRCC 200-E, as indicated by the unrefuted testimony of Ms. Cleland, supports complainant's contention with respect to Item 3329 and reflects the existence of negotiated rates. The evidence further indicates that Sherwin Williams relied upon the agreed-to rates in tendering the subject shipments to Gross and that complainant would not have used defendant to transport its traffic had defendant attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section

[15] While the record in this proceeding reflects a dispute between the parties as to whether Gross was continuing to function as an operating motor carrier, Federal Highway Administration records reveal that Gross' motor carrier operating authorities were revoked on September 19, 1996.

2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that negotiated rates were offered by Gross to Sherwin-Williams; that Sherwin-Williams, reasonably relying on the offered rates, tendered the subject traffic to Gross; that the negotiated rates were billed and collected by Gross; and that Gross now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Gross to attempt to collect undercharges from Sherwin-Williams for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable John C. Shabaz
United States District Court for the
Western District of Wisconsin
P.O. Box 591
Madison, WI 53701

Re: No. 94-C-2168-S

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary